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No. 74-1082

In the
Supreme Court of the United States
October Term, 1974

IN RE NATHAN GROSSGOLD, an Attorney,
Petitioner,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

John F. McCarthy
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Chicago, Illinois 60603

Heretofore appearing as amicus curiae in the Supreme Court of Illinois for the Board of Managers and the Committee on Grievances of The Chicago Bar Association, Sitting as Commissioners of the Supreme Court of Illinois, under Illinois Revised Statutes c. 110A § 751.

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IN RE NATHAN GROSSGOLD, an Attorney,

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JURISDICTION

The Petition for Certiorari was not filed in time and should be dismissed.

Grossgold's Petition for Rehearing was denied by the Illinois Supreme Court on November 26, 1974, not November 27, 1974, as he states. (Petn. 1) (See Appendix A of this Brief.) His Petition for Certiorari should have been filed with this Court within ninety days of that date, or by February 24, 1975. U.S.C.A., Title 28, Sec. 2101(c). It was not filed until February 27, 1975, and, therefore, should be dismissed.

Grossgold's Motion for reconsideration, based on his pardon by the President, and for imposition of a lesser disciplinary sanction, or, in the alternative, for reinstatement, was denied by the Illinois Supreme Court on January 15, 1975. (See Appendix B of this Brief.) The pendency of that Motion did not extend the time for filing the Petition For Certiorari. *Gypsy Oil Co.* v. *Escoe,*

(1927) 275 U.S. 498. The Motion did not raise any new or additional matter. The possibility of the pardon was discussed in Grossgold's Brief and Petition for Rehearing in the Illinois Supreme Court.

QUESTIONS PRESENTED

There is no Federal or Constitutional question involved in this matter.

1. Grossgold was not denied due process in the proceedings before the Illinois Supreme Court and its Commissioners. He received notice of the possibility of an increase in the discipline (suspension for three years) recommended by Division II of the Grievance Committee of The Chicago Bar Association, sitting as Commissioners of the Court. He had a full hearing thereon. The increase in discipline, based on the entire record, represented a difference of opinion between the full Grievance Committee and the Board of Managers of the Association, on the one hand, and Division II, on the other. Further findings were not required. In any event, the Supreme Court suspended Grossgold for three years, thus reinstating Division II's original recommendation. No harm or prejudice to Grossgold occurred.

In Illinois, in disciplinary matters, the Supreme Court is the tribunal of the initial hearing and the Commissioners are regarded as agents for gathering and reporting evidence and making recommendations. No interference with, or suspension of, an attorney's right to practice law in Illinois occurs until after a full hearing before the Supreme Court. Thus Grossgold's "due process" arguments and authorities are inapplicable.

2. The pardon of Grossgold by the President could not change the discipline already imposed by the Illinois

Supreme Court. Under the United States Constitution, Article II, Section 2, Clause 1, the pardon only affected offenses against the United States. The conduct of Grossgold and the harm to the legal profession remained. The power of the Illinois Supreme Court to regulate the legal profession in Illinois and to maintain its discipline of Grossgold cannot be impaired.

ILLINOIS SUPREME COURT RULE

The pertinent parts of Illinois Supreme Court Rule 751 (Proceeding To Strike Attorney's Name From Roll) are set forth in Appendix C of this Brief. This Rule was revised effective February 1, 1973, but was retained as to disciplinary matters then pending, such as Grossgold. Smith-Hurd Illinois Annotated Statutes (S.H.A.), Ch. 110 A, Sec. 751.

STATEMENT OF THE CASE

Reference to additional factual material will be of assistance to this Court.

The record contains the transcripts of the evidence in the criminal proceedings against Grossgold for mail fraud, as well as the opinion of the Federal Court of Appeals therein. That opinion is found in 447 F2d 742 and is reprinted here as Appendix D. Thus the record discloses not only Grossgold's conviction but also the facts in support of it.

The opinion of the Court of Appeals shows the extent of Grossgold's involvement. The Court said, at 447 F2d 744, "There is ample proof to justify the jury in inferring that both Bornstein and Grossgold knowingly participated in the proven scheme to defraud. • • • There is substantial evidence that both Bornstein and Grossgold knew the

subrogation claims were fraudulent." And further, p. 745, "And Grossgold's indirect benefit from Zizzo's and Katz's statements that they dealt with Bornstein was minimal in view of the ample testimony of Grossgold's main participation, through his work as attorney in preparation of the subrogation claims."

Division II of the Grievance Committee of The Chicago Bar Association, as Commissioners of the Illinois Supreme Court, originally heard the evidence in the disciplinary proceedings. It made certain findings and recommended that Grossgold be suspended from the practice of law for three years. (R, Report of Grievance Committee, 4) The full Grievance Committee, also as Commissioners, reviewed the record and heard oral arguments by Grossgold's attorney. It recommended that Grossgold be disbarred. (R, Order of May 1, 1973) The order notifying Grossgold of the hearing before the full Committee advised him that the full Committee was not bound to accept the recommendation of Division II, but might recommend a greater or lesser degree of discipline. (R, Order of February 27, 1973) The Board of Managers of The Chicago Bar Association, likewise as Commissioners, reviewed the record, heard further arguments by Grossgold's counsel and likewise recommended disbarment. (R, Order of July 26, 1973) The order notifying Grossgold of the hearing before the Board of Managers also advised him that the Board was not bound to accept the recommendation of the full Committee, but might, on the basis of the entire record, alter that recommendation. (R, Order of May 1, 1973)

The Illinois Supreme Court suspended Grossgold for three years, thus affirming the original recommendation of Division II. Grossgold first raised his "due process" objections in his Brief in the Illinois Supreme Court.

REASONS FOR REFUSING WRIT

I.

GROSSGOLD WAS NOT DENIED DUE PROCESS.

Grossgold was afforded every right guaranteed to him by the phrase, "due process." He received notice of the proceedings and the hearings therein. The notices advised him that the full Grievance Committee and the Board of Managers did not regard themselves as bound by previous recommendations of discipline and might alter the same. (R, Order of February 27, 1973, Order of May 1, 1973) Grossgold attended each hearing and was represented by the able counsel who appear for him in this Court.

Division II of the Grievance Committee made certain findings and recommended a suspension of three years. (R, Report of Grievance Committee, 4) The full Grievance Committee and the Board of Managers reviewed the record, heard oral arguments of Grossgold's attorney and recommended disbarment. (R, Order of May 1, 1973, Order of July 26, 1973) The reasons for their respective actions are found in the record which they reviewed. There was no additional evidence. There was no need for further findings. There merely was a difference of opinion between the full Committee and the Board of Managers, on the one hand, and Division II, on the other, about the appropriate discipline.

The Illinois Supreme Court further reviewed the record, considered oral arguments and suspended Grossgold for three years, thus affirming Division II's original recommendation. Whatever may be said about any deficiencies in this record, and we admit of none, no harm

or prejudice to Grossgold can be shown. Division II's original recommendation was a suspension of three years. The Supreme Court's final judgment was just that.

Grossgold's only "due process" argument is that the full Committee should have assigned reasons, in writing, when it recommended disbarment instead of suspension for three years. In making this contention, he overlooks the essential difference between this proceeding and those in the decisions which he cites.

In Illinois, in disciplinary matters, the Supreme Court is the tribunal of the initial hearing and the Commissioners are regarded as agents for gathering and reporting evidence and making recommendations. Thus, for example, in *In Re McCallum,* (1945) 391 Ill. 400, 64 N.E. 2d 310, the Court said, 391 Ill. 419, "• • • for purposes of this kind of a case (a disciplinary matter), this is a court of initial hearing, and the commissioners are merely agents for the purpose of gathering and reporting the evidence." And in *In Re Krasner,* (1965) 32 Ill. 2d 121, 204 N.E. 2d 10, the Court said, 32 Ill. 2d 130, "Such recommendation (by the Board of Managers of a suspension of five years) is, of course, purely advisory, inasmuch as we are regarded as a court of initial hearing in a case of this kind."

It follows, as is the case in Illinois and with Grossgold, that the recommendations of the full Committee and the Board of Managers do not result in any denial of the attorney's rights and do not impair his right to continue to practice law. No interference with, or suspension of, that right occurs until after a full hearing before the Supreme Court. Thus Grossgold's "due process" arguments are inapplicable in this situation.

In the decisions cited and relied on by Grossgold, the preliminary administrative hearings resulted in some deprivation of liberty or property. Thus, in *Morrissey* v. *Brewer*, 408 U.S. 471, a paroled convict was detained in jail; in *Landman* v. *Royster*, 333 F. Supp. 621, and *Krause* v. *Schmidt*, 341 F. Supp. 1001, convicts were disciplined; and in *Goldberg* v. *Kelly*, 397 U.S. 254, and *Coral Gables Convalescent Homes* v. *Richardson*, 340 F. Supp. 647, public assistance benefits and Medicare payments were stopped. Thus, "due process" requirements were found to be applicable in those cases.

II.

THE PARDON OF GROSSGOLD COULD NOT CHANGE THE DISCIPLINE IMPOSED BY THE ILLINOIS SUPREME COURT.

The President granted Grossgold an executive pardon. This was done after the Illinois Supreme Court had suspended Grossgold for three years and had denied his Petition for Rehearing. It is clear that the pardon could not affect the discipline.

The Federal Constitution gives the President power "to grant Reprieves and Pardons for Offenses against the United States." By its very terms, the Executive's power is limited to Federal offenses. It leaves unaffected the rights and powers of the States and the duties and obligations of citizens to the States. Thus the pardon to Grossgold could not impair the discipline imposed by the Illinois Supreme Court.

The record here contains not only the proof of Grossgold's conviction but also the transcripts of the evidence in the criminal proceedings against him and the opinion of the Federal Court of Appeals. Thus this Court has

before it, as the Illinois Supreme Court also did, the account of Grossgold's activities. That conduct and the harm to the legal profession remain. The pardon of the President is powerless to erase them.

Some years ago, the Illinois Supreme Court adopted the view that an executive pardon should not relieve an attorney from disciplinary action. *The People* v. *Gilmore,* (1905) 214 Ill. 569, 73 N.E. 737. There, the attorney had been convicted of embezzlement and pardoned. In discussing the effect of the pardon, the Illinois Supreme Court said, 214 Ill. 571-72:

> "The crime of which the respondent was convicted and imprisoned in the penitentiary of the State of Missouri was an infamous offense, which involved not only moral turpitude, but also the lack of professional integrity. The conviction of that crime had the effect to degrade him and to establish that he was of bad moral character as a man and as a lawyer. The pardon granted him by the then acting Governor of the State of Missouri did not efface the moral turpitude and want of professional honesty involved in the crime nor obliterate the stain upon his moral character."

The Courts of the District of Columbia have taken the same position. *Bowles* v. *Laws,* (1930, C. A., D. C.) 45 F2d 669, 59 App. D. C. 399, certiorari denied 283 U. S. 841. In that case, the attorney had been convicted of concealing stolen securities. He also had been disbarred. In 1927, he had performed certain services which the Bar Association contended were the practice of law. Thereafter, he received a "full and unconditional pardon" from the President. The trial court found him guilty of contempt and fined him. The Court of Appeals affirmed,

and, in considering the effect of the pardon, said, 45 F2d 671:

> "But we may add that, in the Matter of ....., an Attorney, 86 N. Y. 563, where an attorney had been granted a pardon prior to the institution of disbarment proceedings, the court held that a pardon wipes out the offense against the public, but does not annul the act or affect the right of the court to punish for professional misconduct."

The New York Court of Appeals reached a similar conclusion. *People ex rel. Prisament* v. *Brophy,* (1941) 287 N. Y. 132, 38 N.E. 2d 468, certiorari denied 317 U.S. 625. There, in 1937, in the Federal Court in Georgia, Prisament was convicted of robbing a member bank of the Federal Deposit Insurance Corporation. Two years later, he received "a full and unconditional pardon" from the President. In 1940, in the Court of General Sessions in New York, he was convicted of attempted robbery. The problem was whether Prisament was a first or second offender for the purpose of sentencing. The Court of Appeals held that he was a second offender. In discussing the pardon, the Court said, 38 N.E. 2d 470, 471:

> ". . . The President is empowered 'to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.' U. S. Const. art. II, § 2. Neither Congress nor a State Legislature can limit the constitutional power of the President to exempt an offender from punishment for his offense (Ex parte Garland, supra); but the State may still provide that in fixing the penalty for an offense against the sovereign State, the offender's past conduct, including the commission of an offense against another sovereign, may be taken into account even though the offender has been pardoned by such other sovereign. The Constitution, which confers upon the

> President the power to pardon, does not confer upon him power to wipe out guilt. In measuring the punishment of a person who is convicted of an offense against this State, after he has been convicted of an offense against the United States, the State may determine as it sees fit both the effect that shall be given to the previous conviction and the effect that shall be given to a presidential pardon for that offense."

In this part of his Petition, Grossgold principally relies on *Ex Parte Garland*, 4 Wall. 333. But that decision can be distinguished readily and is not persuasive. It involved a Federal offense and a Presidential pardon. It considered the effect of that pardon on the right of the attorney to practice in the Federal courts. It is not authority on the effect of such a pardon on discipline already imposed by a State court. It is clear that such a pardon has no effect. *People ex rel. Prisament* v. *Brophy*, (1941) 287 N. Y. 132, 38 N.E. 2d 468, 470, 471, certiorari denied, 317 U.S. 625, supra; *Ex parte Quarrier and Fitzhugh*, (1870) 4 W. Va. 210, 227; *U. S.* v. *Donofrio*, (1971, C. A. 5th) 450 F2d 1054, 1056.

CONCLUSION

Grossgold's Petition for Certiorari is not well founded and should be denied.

Respectfully submitted,

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Chicago, Illinois 60603

Heretofore appearing as amicus curiae in the Supreme Court of Illinois for the Board of Managers and the Committee on Grievances of The Chicago Bar Association, Sitting as Commissioners of the Supreme Court of Illinois, under Illinois Revised Statutes c 110A § 751.

APPENDIX A

STATE OF ILLINOIS
OFFICE OF
Clerk Of The Supreme Court
SPRINGFIELD
62706

Justin Taft
Clerk

Telephone
Area Code 217
782-2035

November 26, 1974

Mr. John McCarthy
Counsel
Chicago Bar Association
100 W. Monroe St.—Room 2000
Chicago, Ill. 60603

No. 46062—In re: Nathan Grossgold, an Attorney. Information.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

Justin Taft
Clerk of the Supreme Court

APPENDIX B

OFFICE OF
Clerk Of The Supreme Court
STATE OF ILLINOIS
SPRINGFIELD
62706

January 15, 1975

Mr. Robert S. Bailey
Mr. James R. Bellmann
Attorneys at Law
53 West Jackson Blvd.
Chicago, Illinois 60604

In re: Nathan Grossgold. No. 46062

Gentlemen:

The Supreme Court today made the following announcement concerning the above entitled cause:

> "The motion by Nathan Grossgold for reconsideration of the order entered September 17, 1974, and to impose a lesser disciplinary action, or, in the alternative, to consider this motion as a motion for reinstatement is denied."

Very Truly yours,

Clerk of the Supreme Court

CLW:jae
cc: John F. McCarthy
Carl H. Rolewick

APPENDIX C

Sec. 751. (SUPREME COURT RULE 751). PROCEEDING TO STRIKE ATTORNEY'S NAME FROM ROLL

(a) The Board of Governors and its existing Committee on Grievances, and their successors as such, of the Illinois State Bar Association, and the Board of Managers and its existing Committee on Grievances, and their successors as such, of the Chicago Bar Association, are hereby appointed as Commissioners of the Supreme Court and are empowered and charged to make investigations from time to time, as may be necessary, concerning practices of attorneys at law which tend to defeat the administration of justice or to bring the courts and the legal profession into disrepute. To this end, these commissioners are further empowered and charged to receive, entertain, inquire into, and take proof concerning complaints against attorneys at law of this state, and may call to their assistance in such inquiries other members of the bar or bar associations of the state, may make all necessary rules and regulations concerning the conduct of such inquiries, and may themselves, or by such committees as they may designate, take the evidence of witnesses, as hereinafter provided.

• • •

(d) Upon application by such commissioners, or committees, the clerk of the Supreme Court shall issue writs of subpoena ad testificandum, writs of subpoena duces tecum, or dedimus potestatem to take depositions. The commissioners and their committees are empowered to take and transcribe the evidence of witnesses, who shall be sworn by a commissioner or any person authorized by law to administer oaths, and the commissioners shall report to the Supreme Court the failure or refusal of any person to attend and testify in response to any subpoena. The hearings before the commissioners or com-

mittees shall be private unless the respondent shall request that they be public.

(e) At the conclusion of a hearing upon any complaint against any attorney before such commissioners or committees, the Board of Governors or Board of Managers, as the case may be, shall, if action by the Supreme Court of any kind is recommended, make report to the Supreme Court of its conclusions of fact and law concerning the complaint, answer and proof; and thereupon such matters shall stand for hearing and disposition in this Court. Such report shall be entered on the docket and entitled in the name of the respondent. Upon the filing of any such report with proof of service of a copy thereof on the respondent in the same manner as briefs are required by rule of the Supreme Court to be served, the respondent therein shall have ten days from the date of such filing to file exceptions thereto, and shall, within twenty days after the filing of such exceptions, bring to the Supreme Court the record and proofs, or such parts thereof as may be necessary to enable the Court to pass upon such exceptions. The commissioners, upon request of the respondent and payment of the actual cost thereof, shall certify to the Court the proofs and record, or such parts thereof as the respondent may designate. With such record the respondent shall file a printed brief and designation of excerpt from record or an abstract as provided in rules 341, 342, and 344.

(f) Upon the filing of exceptions to such report by the respondent, the Board of Governors or the Board of Managers, as the case may be, shall designate a member of the bar to file such certificates of proof, additional designation of excerpts or additional abstract, and brief, as may be deemed necessary fully to advise the Court. Such additional designation or additional abstract, if any, and brief shall be filed within twenty days after the filing of the respondent's designation or abstract and brief, and respondent may file a reply brief and excerpts from record in 10 days. The number of excerpts or abstracts and briefs and the manner of their duplication and service shall be governed by rule 344.

APPENDIX D

UNITED STATES of America,
Plaintiff-Appellee,

v.

Melvin S. BORNSTEIN, Defendant-
Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Nathan GROSSGOLD, Defendant-
Appellant.

Nos. 17860, 17861

United States Court of Appeals,
Seventh Circuit.

June 9, 1971.

Certiorari Denied Oct. 12, 1971.
See 92 S.Ct. 88.

Before KILEY and CUMMINGS, Circuit Judges, and MORGAN, District Judge.[1]

KILEY, Circuit Judge.

Defendants Bornstein and Grossgold were each convicted by a jury under nine counts of an indictment charging violation of 18 U.S.C. § 1341 in the use of mail to further a scheme to defraud. Both have appealed. We affirm.

Bornstein and Albert Rosenthal, a "relative" of Bornstein, formed the Whitehall Insurance Company in 1961. In May, 1961, they acquired an inactive insurance company and activated it under the name of Whitehall Mutual

Fire and Marine Insurance Company. Bornstein's brother-in-law, Grossgold, a New York attorney, became claims manager of Whitehall in 1962. In March of 1963 his employment by Whitehall was terminated, but as an independent attorney working in the Whitehall office building he continued to handle subrogation claims for Whitehall against other insurance companies on a percentage basis. It is upon the falsity in documents supporting the subrogation claims filed by Grossgold that the charges of fraud before us are based.

Whitehall ceased doing business in December of 1963, and its assets and records were turned over to the Illinois State Bureau of Liquidations in November of 1964. The indictment before us was filed in June, 1968.

Each defendant contends that the evidence is insufficient to sustain the verdict against him; that he was denied his constitutional right to a speedy trial; that reversible error was committed by the court's denial of a severance of his trial from that of the other; and that he was prejudiced by denial of continuance to obtain another lawyer.

I.

[1] Defendants contend there is insufficient evidence to support the guilty verdicts. We see no reason to discuss in detail the abundant proof adduced at trial to sustain the verdict. The fraudulent scheme was shown by the testimony of Palumbo, one of the garage owners involved in the scheme, that either Bornstein or Grossgold would call him to make arrangements for repair of a damaged automobile covered by a Whitehall policy. After examining the car, Palumbo would make up a written estimate for the cost of repairs and convey it to Whitehall, and an agreement would be made between Palumbo and Bornstein or Grossgold to repair the automobile at a cost lower than the estimate. The estimate, marked "paid," would then be sent to the insurer of the person whose car collided with that of Whitehall's insured, along with a subrogation claim written by Grossgold.

Whitehall would then be paid the amount stated on the estimate.

This testimony was fully corroborated by Whitehall's files. For example, insured Baugh's file, used in proof of Count V, contains an estimate on Palumbo's stationary in the amount of $190.25, marked "paid;" a cover letter written by Grossgold to Economy Fire and Casualty Co., insurer of the driver of the other automobile involved in the Baugh collision, referring to "the paid repair bill in the amount of $190.25" which was sent with the letter; and a check from Economy in the amount of $190.25 made payable to Baugh and/or Grossgold. The file also shows a bill from Palumbo for "agreed price $150.00" minus "100.00 Ded.," with a balance due of $50.00; a check made payable to Palumbo in the amount of $50.00 signed by Melvin Bornstein on behalf of Whitehall; and a letter to insured Baugh directing him to pay his $100.00 deductible directly to Palumbo. Palumbo testified that he and Whitehall agreed on $150.00 to make that particular repair, and that he received $100.00 of that amount from the insured (the policy had $100.00 deductible) and $50.00 from Whitehall. The pattern was followed, generally, with respect to each count in the indictment.

There is ample proof to justify the jury in inferring that both Bornstein and Grossgold knowingly participated in the proven scheme to defraud. In addition to Palumbo's testimony as to the active participation of both Bornstein and Grossgold, there is the testimony of Pekin, another Whitehall employee who occasionally wrote letters regarding subrogation claims, that Bornstein told him that the reason the subrogation claims were inflated was to cover legal costs and handling expenses. And the record also contains a note written by Bornstein to Grossgold directing Grossgold to see if he could collect on another subrogation claim, and if he could, Whitehall would "pay and get subro agreement for better amount."

There is also evidence that Grossgold, who directly handled the subrogation claims, wrote a note to an uninsured motorist whose car had collided with that of a

Whitehall insured, concerning arrangements for payment of a subrogation claim in the amount of $500.00. The top of the Whitehall file in that case reflected that total payments by Whitehall were only $350.00, and Grossgold admitted that he had written on the Whitehall file a notation of a conversation with the uninsured motorist. And the note from Bornstein and another note from Palumbo indicated that Grossgold was aware that Whitehall sent out inflated subrogation bills, even if Grossgold did not pursue the claims in those particular cases. There is substantial evidence that both Bornstein and Grossgold knew the subrogation claims were fraudulent.

In imprisoning Bornstein for two years, and merely fining Grossgold, the district court evidently had in mind the pro rata fraudulent participation of defendants in the several offenses. The distinction between the defendants' guilt shown in sentencing, however, is no indication that the joint trial resulted in the jury's convicting Grossgold merely because of his association with Bornstein. Rather the sentences show the court's determination of the degree of guilt of each defendant.

II.

[2] The crimes charged in the indictment are alleged to have occurred between June 17, 1963 and December 4, 1963. Whitehall voluntarily turned over its books and records to the Illinois Department of Insurance at the end of 1963.[2] The Department alerted the postal authorities who in 1965 or 1966 began the investigation which led to the indictment. The investigation, involving over 140 files, ended on April 18, 1968. The indictment followed on June 18, and the jury returned its verdicts March 10, 1969.

During the investigation interviews were conducted of Whitehall's insureds and of persons insured by other

[2] The books and records were warehoused by the Department until a liquidator for Whitehall was appointed in 1965 and the records removed for examination by the Department.

companies. Hoffman, a claim adjuster for Whitehall, died in January, 1963. Zizzo, owner of one of the garages allegedly involved in the scheme, was interviewed in March, 1968, and died in October, 1968. Katz, another Whitehall adjuster, was interviewed in February, 1968, and died in November, 1968. The investigation ended and the report was given the United States Attorney in April, 1968.

Postal Inspector Potter who conducted the investigation filed an affidavit in support of the government's response to defendants' motion to dismiss the indictment for the delay. In this affidavit, Potter stated that Zizzo told him at the March, 1968 interview that he had, at Bornstein's request, "inflated bills" for repairs and either mailed or delivered them to Bornstein; and that Katz told Potter at the February interview that he worked for Bornstein, that Bornstein and Grossgold took care of all the claim work and that Katz always turned over the work to Bornstein. No written statements were signed by Zizzo or Katz and neither testified before the grand jury.

Both defendants contend that this delay between the time the offense was committed and the day the indictment was returned denied defendants the right to a speedy trial and to due process. Both defendants rely upon Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970), and the prejudice resulting from the delay. Specifically, the prejudice relied upon is the death of Zizzo and Katz, and the destruction of part of Grossgold's records—all of which events occurred between 1965 and 1968.

We see no merit in the contention that the district court committed reversible error in denying the motion to dismiss. The statute of limitations would have run against the offenses if indictment was delayed four days longer. But this is not conclusive, United States v. Haggerty, 419 F.2d 1003 (7th Cir. 1969). See United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.E.2d 627 (1965). It had not run when the indictment was filed, United

States v. Panczko, 367 F.2d 737 (7th Cir. 1966), and while it is possible that a delay within the statute of limitations could be so unreasonable and prejudice so great that due process would be violated, United States v. Deloney, 389 F.2d 324 (7th Cir. 1968), this is not such a case.

The affidavit of Potter indicates that both Katz and Zizzo would have incriminated Bornstein if they were alive and had testified. Their death prior to trial was in effect prejudicial to the prosecution and not the defense. And Grossgold's indirect benefit from Zizzo's and Katz's statements that they dealt with Bornstein was minimal in view of the ample testimony of Grossgold's main participation, through his work as attorney in preparation of the subrogation claims. Also, Hoffman's testimony would have been of no value to the defense since he died in January of 1963, a time prior to most of the activities alleged in the indictment. And we are unable to see how Grossgold's destruction of his records could prejudice him under the facts here.

Dickey v. Florida, *supra,* does not compel a decision here that the delay was a violation of defendant's right to a speedy trial. In *Dickey* there was an eight year delay between arrest and trial, during which Dickey continually demanded trial, and the prosecutor provided no good reason for rejecting the demands. Here there was a two year delay in discovery of the possible fraud and a three year delay during which the postal authorities examined 140 files and selected 29 files for further investigation. This delay is not unusual in a case which requires extensive investigation of documents. We cannot say that it constituted "[d]eliberate governmental delay designed to harm the accused" condemned in *Dickey.* This case is closer to United States v. Lee, 413 F.2d 910 (7th Cir. 1969). There we rejected a similar claim on the basis that testimony at the trial showed no prejudice and defendant was able to recall specific facts concerning the incident in question.

III.

[3] Each defendant also claims reversible error in the court's denial of each defendant's motion for severance. This ruling was made within the court's discretion. United States v. Echeles, 352 F.2d 892, 897 (7th Cir. 1965). We see no abuse of discretion. Implicit in each one's argument on this point is a claim of prejudice in being tried with the other—the culprit. Bornstein's defense was good faith reliance on attorney Grossgold who "had complete knowledge of the files." Grossgold's argument is that trial with Bornstein exposed him to a finding of guilt by association with Bornstein and Whitehall, since he was an attorney for Whitehall and tenant of the office space in the same building and relied upon bills prepared Bornstein.

Mutual hostility between the defendants is evident. But that does not alone control the court's discretion on the severance motions. Dauer v. United States, 189 F.2d 343, 344 (10th Cir. 1951), cert. den., 342 U.S. 898, 72 S.Ct. 232, 96 L.Ed. 672. The district court was not required on the showings made to conclude that the respective asserted defenses precluded a fair trial to each. *See* United States v. Hutul, 416 F.2d 607, 620-621 (7th Cir. 1969). Although each sought to escape conviction by placing the guilt on the other, their defenses were actually compatible since both claimed ignorance of the transactions.

Defendants cite United States v. Echeles, 352 F.2d 892 (7th Cir. 1965) and Campbell v. United States, 122 U.S. App.D.C. 143, 352 F.2d 359 (1965). Those cases are distinguishable. In *Echeles,* a co-defendant made a statement which could have exculpated the defendant and this court ordered a severance. In *Campbell,* the evidence against one defendant was overwhelming and the evidence against the other insignificant. The court ruled that the defendants' trial should be severed because the person against whom the evidence was slight could be prejudiced by being tried with the other defendant. The showings

made by the defendant in both those cases went far beyond a showing of hostility.

IV.

[4] Both Bornstein and Grossgold claim prejudice in denial of their motion for a continuance in order to obtain an additional attorney. They argue that representation by the same attorney prejudiced each. We see no merit in this point. The motions for separate trials were made November 23, 1968, and a 60 day continuance was sought to obtain an additional attorney. Although the motion was not granted, the trial began more than 60 days after the motion was made. There was ample time to obtain the attorney before trial to avoid what prejudice, if any, resulted from lack of an additional attorney.

For the reasons given, the judgment is affirmed.